No. 90-1672

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

WARREN J. HOFFMAN,

Petitioner,

v.

ROBERT W. KIMPTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is it unconsitutional under the due process and equal protection clauses of the United States Constitution for the Montana Supreme Court to refuse to consider the petitioner's federal constitutional challenges to a state statute invoked to terminate his parental rights where the refusal was solely because the petitioner did not immediately notify the Attorney General of the constitutional challenges when the lower court record was filed, where the Attorney General was notified before any briefs were filed and 128 days before the appeal was deemed submitted, and where no prejudice resulted because the Attorney General decided not to intervene?

2. Does M.C.A. § 40-8-111(1)(a)(v) violate the petitioner's federal constitutional rights to liberty, equal protection, and due process where the statute was invoked to terminate his parental rights, where the sole consideration under the statute was whether he became delinquent in his child support obligations, and where no consideration was given to his ability to pay, the non-monetary support he provided to his children, and his post-adoption petition support payments?

NOTIFICATION TO THE ATTORNEY GENERAL OF THE STATE OF MONTANA

To the Honorable Marc Racicot:

Please be advised that 28 U.S.C. § 2403(b) may apply to this Writ of Certiorari because the petitioner challenges the constitutionality of M.C.A. § 40-8-111(1)(a)(v).

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I. DECISION BELOW

The initial decision and final decree in this case were entered respectively on May 2 and May 3 of 1990 by the Honorable William J. Speare, District Court Judge, Thirteenth Judicial District, Yellowstone County, Montana. The decision and final decree appear at pages 1 and 10 of the Appendix. The Montana Supreme Court's decision on appeal was issued December 13, 1990. This decision appears beginning on page 13 of the Appendix. It is also reported as Matter of Adoption of C.J.H, ____ Mont. ____, 803 P.2d 214 (1990).

II. JURISDICTION

The Montana Supreme Court issued its decision in this case on December 13, 1990. The petitioner timely filed a petition for rehearing which the Montana Supreme Court denied on January 28, 1991. See Appendix at 56. At trial and on appeal, the petitioner challenged the

constitutionality of M.C.A. § 40-8-111(1)(a)(v) as violating his rights to liberty, equal protection, and due process guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution when the statute was used to terminate his parental rights. In affirming the District Court's decision, the Montana Supreme Court refused to review the petitioner's federal constitutional challenges to the statute.

On rehearing, the petitioner asserted that the Montana Supreme Court's refusal to consider his federal constitutional challenges constituted a violation of his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution. Accordingly, because the Montana Supreme Court's decision draws into question the constitutional validity of a state statute, as well as the right to due process on appeal, this Court has jurisdiction to review the Montana Supreme

Court's decision under 28 U.S.C. § 1257 (a).

The relevant constitutional provisions, statute, and procedural rule involved in this case are as follows:

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Section 1 to the Fourteenth Amendment to the Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

> which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive ay person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

M.C.A. § 40-8-111(1)(a)(v) provides:

> Consent required for adoption. (1) An adoption of a child may be decreed when there have been filed written consents to adoption executed by:
>
> (a) both parents, if living, or the surviving parent of a child, provided that consent is not required from a father or mother;
>
> * * *
>
> (v) if it is proven to the satisfaction of the court that the father or mother, if able, has not contributed to the support of the child during a period of 1 year before the filing of a petition for adoption;

Rule 38 of the Montana Rules of Appellate Procedure provides:

> It shall be the duty of counsel who challenges the constitutionality of any act of the Montana legislature in any suit or proceeding in the supreme court to the state of Montana, or any agency thereof, or any officer

> or employee thereof, as such officer or employee, is not a party, upon the filing of the record to give immediate notice in writing to the court of the existence of said question, specifying the section of the code or the chapter of the session law to the construed. The clerk shall thereupon certify such fact to the attorney general of the state of Montana.

III. STATEMENT OF THE CASE

A. Background and Relevant Facts.[1]

The petitioner, Warren J. Hoffman, married Mary Christine Anderson on February 15, 1975. They had three daughters during their marriage: Chelsea Jo Hoffman, born June 16, 1976; Whitney Lin Hoffman, born May 18, 1978; and Tory Ann Hoffman, born November 23, 1979. Mr. Hoffman supported his family throughout his eleven year marriage through steady employment as a carpenter and building inspector.

Mary Anderson filed for divorce in

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[1] These facts are taken directly from the trial record. While the facts themselves are undisputed, their legal significance is contested.

January 1985. The case was tried in April 1986 with a decision being issued a month later in May. Finding that the "interaction and relationships of the children with both parents is good" and that both parents "are fit and proper persons to have the care, custody, and control of the minor children...", the District Court awarded joint custody of the children Mr. Hoffman and Ms. Anderson. The District also ordered Mr. Hoffman to pay $125 per month per child in child support and required him to maintain the children on his medical insurance policy.

Mr. Hoffman had been working for the City of Billings as a building inspector for about two years when the divorce decree was entered in May 1986. He continued working for the City of Billings until July 1987. During this time, Mr. Hoffman promptly made all of his child support payments.

Mr. Hoffman left his job with the

City of Billings in July 1987 to resume his carpentry trade. He did so after repeated conflicts with his supervisor made it apparent that he would soon be demoted and/or fired. After leaving the City of Billings, Mr. Hoffman immediately obtained work as a self-employed carpenter and remained current on his child support payments through November 1987. In December 1987, however, he was only able to pay $200 of the $375 total because of lack of work caused by unusually cold weather and poor economic conditions.

Mr. Hoffman diligently sought out carpentry work and applied for other jobs during the first six months of 1988. Unfortunately, he found little work, his income plummeted, and, for the first time in his life, Mr. Hoffman found himself in poverty.

During January and February of 1988, for example, Mr. Hoffman's income was $495. For the first six months of 1988,

his income averaged only $567 per month, while his food and housing expenses alone averaged $437 per month. With about $130 a month left for utilities, medical expenses, gas, insurance, car repairs, and other essential expenses, Mr. Hoffman could barely support himself. At times he had to rely on friends for food and a place to sleep. Consequently, Mr. Hoffman could not and did not make any child support payments for the first six months of 1988. Mr. Hoffman, however, continued to see his children regularly.

Mr. Hoffman eventually was able to obtain more work and his income improved during the last half of 1988. For the year, Mr. Hoffman's net income was about $10,870, while his living expenses were about $10,850.

On September 1, 1988, Mr. Hoffman bought a $100 money order for child support made payable to Chris Anderson. He gave the money order to his oldest

daughter Chelsea during a visit with instructions to give it to her mother. When Chelsea gave the money order to Ms. Anderson, she took it, confronted Mr. Hoffman and, in front of the children, told him that he owed her a lot more than $100 and that she would not accept the money order. Ms. Anderson then handed the money order back to Mr. Hoffman who took it and left.[2]

The next day, Ms. Anderson saw her attorney and decided that she should accept the money order. She then called Mr. Hoffman and demanded the money order back. Mr. Hoffman responded by letter a week later. In that letter, Mr. Hoffman wrote that he had been humiliated and demeaned in front of his children by Ms.

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[2]The Montana Supreme Court's decision implies that a factual dispute exists as to whether Ms. Anderson received the money order. This inference is totally inaccurate. As the District Court found, Ms. Anderson received the money order, but returned it to Mr. Hoffman because she believed it was grossly inadequate. District Court Finding of Fact, para. 8.

Anderson's refusal to accept the $100, that he could no longer cope with her threats to ruin him, and that he would use the money to obtain counseling to help him cope with her behavior.

Mr. Hoffman did not make any child support payments in October, November, or December of 1988. He did, however, purchase a winter coat for Whitney in November 1988 after learning that she needed one. The coat cost $58 which Mr. Hoffman obtained by returning some sawhorses which he had recently purchased. In addition, Mr. Hoffman spent $191 on Easter, birthday, and Christmas gifts for his children in 1988 as well as spending another $165.00 on the children during his custody periods with them in 1988.

Mr. Hoffman did not take any vacations, did not buy any appliances or furniture, and did not save or invest any money in 1988. His debts totalled over $12,000. He tried to obtain small loans,

but was refused. In fact, Mr. Hoffman did not have enough money to buy a bed to sleep on in 1988. He only vehicle was a 1976 Volkswagon van.

Ms. Anderson married Robert Kimpton on September 20, 1986, four months after her divorce. On January 3, 1989, Mr. Kimpton filed a petition to adopt Mr. Hoffman's three daughters, exactly one year after Mr. Hoffman's December 1987 support payment.

Mr. Kimpton alleged that, pursuant to M.C.A. § 40-8-111(1)(a)(v), Mr. Hoffman's consent to the proposed adoption was not necessary "as the Natural Father has not contributed to the support of the minor children since December 1987, and has been capable of doing so." Mr. Kimpton did not allege or contend that Mr. Hoffman had abused or neglected his children, that he was unfit, or that he posed any danger to the children's welfare.[3]

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[3]After finding that Mr. Hoffman's consent to the

At trial, Mr. Kimpton and Ms. Anderson admitted that, before filing the petition, they knew nothing about Mr. Hoffman's income, expenses, or efforts to obtain work. In fact, Ms. Anderson had never attempted to compel payment of the child support arrearage at any time. The only evidence concerning Mr. Hoffman's income and expenses came from Mr. Hoffman. Those figures were not disputed.

Trial on the adoption petition was

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adoption was unnecessary, the District Court gratuitously and inexplicably stated that "continued contact between Respondent [Mr. Hoffman] and the children seriously endangers the children's physical and emotional welfare." District Court Finding of Fact, para. 12. That the District Court failed to give any basis for this finding is not surprising since no evidence was presented nor any argument made during trial that Mr. Hoffman posed any danger to his children.

The District Court's decision that Mr. Hoffman's consent to the adoption was unnecessary is not premised on any finding of abuse or neglect. The only explanation for such a baseless, irrelevant finding is that, after taking nearly a year to rule on the adoption petition, the District Court simply confused this case with another. Though totally irrelevant and never an issue, the District Court's unfortunate assertion that Mr. Hoffman posed a danger to his children unfairly taints him as a father. The Montana Supreme Court referred to this finding in making its decision.

held May 18, 1989. Mr. Hoffman was represented by counsel on a pro bono basis. Before trial, Mr. Hoffman paid $40 in child support to Ms. Anderson in February 1989, $40 in March 1989, and $100 on May 1, 1989. In addition, a check for $100 was used as a substitute for the $100 September 1, 1988 money order and was delivered through counsel to Ms. Anderson before trial.

B. Constitutional Issues Raised During Trial and on Appeal.

Trial was concluded on May 18, 1989. The parties then submitted proposed Findings of Fact and Conclusions of Law together with post-trial briefs. The District Court did not rule for nearly a year. When the District Court did finally issue a decision, it ruled that Mr. Hoffman's consent to the adoption "is not required pursuant to M.C.A. § 40-8-111(1)(a)(v) (1987) because he has failed in his child support obligation." District Court Finding, para. 9. The

District Court, however, made no finding concerning Mr. Hoffman's ability to pay.

With respect to the constitutional issues, the District Court noted that "Respondent [Mr. Hoffman] contends that M.C.A. § 40-8-111(1)(a)(v) is unconstitutional in that it violates Respondent's rights to liberty, equal protection, and due process under both the United States and the State of Montana's constitution." District Court's Finding, para. 18. The District Court summarily rejected Mr. Hoffman's constitutional claims by concluding:

> That §40-8-111(1)(a)(v) is not unconstitutional under either the Federal or State Constitutions in that the Respondent's fundamental liberty interest has not been violated and that this action is not taken by the State of Montana acting under the section but even so the State of Montana has a compelling State interest in the adoption of children and hence the disputed section is neither unconstitutional in general nor as applied to this particular case.

District Court Conclusion of Law, para. 3.

Mr. Hoffman appealed.

In an appeal where the State of Montana is not a party, Rule 38 of the Montana Rules of Appellate Procedure requires counsel who challenges the constitutionality of a state statute to "upon the filing of the record... give immediate notice in writing to the court" of the challenge so that the Attorney General can be notified. Mr. Hoffman filed his Notice of Appeal on May 7, 1990. The Clerk of the District Court transmitted the record on appeal directly to the Clerk of the Montana Supreme Court. The record was filed in the Montana Supreme Court on May 25, 1990 with counsel being notified of the filing by mail. Mr. Hoffman's counsel received notice that the record had been filed on May 29, 1990. On June 11, 1990, Mr. Hoffman mailed to both the Attorney General and to the Clerk of the Supreme Court his Rule 38 Notice of Constitutional Challenge. The Clerk filed the Notice on

June 13, 1990.

Mr. Hoffman's initial brief on appeal was filed June 29, 1990, and raised three issues for review:

> 1. Did the District Court apply the wrong legal standards in permitting Mr. Hoffman's children to be adopted without his consent?
>
> 2. Did Mr. Kimpton contribute to the support of his children in 1988 despite being impoverished for most of the year?
>
> 3. Did the District Court err in holding that MCA § 40-8-111(1)(a)(v) does not violate Mr. Hoffman's rights to liberty, equal protection, and due process under the United States Constitution as well as his rights to liberty and equal protection under the Constitution of the State of Montana?

Mr. Hoffman served a copy of his initial brief on the Attorney General. Mr. Kimpton's response brief was filed August 21, 1990. Mr. Kimpton fully briefed the constitutional issues and did not raise the issue of whether Mr. Hoffman had complied with Rule 38. Mr. Kimpton also served the Attorney General with a

copy of his brief. Mr. Hoffman's reply brief was filed September 26, 1990, and the case was deemed submitted on briefs en banc on October 19, 1990.

In Rule 38 cases, the Attorney General's customary practice is to wait at least until the appellant's initial brief has been filed to determine whether intervention would be appropriate. See Affidavit of Patricia Jordan attached to Petition for Rehearing, Appendix at 25. After reviewing Mr. Hoffman's initial brief and Mr. Kimpton's response brief, the Attorney General decided not to intervene.

By a five to two vote, the Montana Supreme Court affirmed the District Court. The Supreme Court held that the District Court acted within its discretion in finding that Mr. Hoffman "failed in his child support obligation, and therefore his consent was not needed under § 40-8-111(1)(a)(v), MCA." Matter of Adoption of

C.J.H., 803 P.2d at 215.

With respect to the constitutional issues, the Supreme Court noted that Mr. Hoffman's Rule 38 notice was not filed until twenty days after the record on appeal was filed. The Court held that this twenty day delay did not comply with the immediate notice provisions of Rule 38, and further commented that Mr. Hoffman "presented no facts to explain the delay of twenty days." Id. at 216. Because of this twenty day delay, the Montana Supreme Court refused to address Mr. Hoffman's constitutional challenges. The Montana Supreme Court, however, did not explain what, if any prejudice, had been caused by the delay.

The two dissenting justices voted to reverse the District Court on the ground that "the records fails to show by clear and convincing evidence the ability of the appellant to pay the support; and the District Court did not make any finding as

to the appellant's ability to pay." Id. at 217.

Mr. Hoffman petitioned for a rehearing. The petition explained that the delay in filing the Rule 38 notice was due to counsel's initial misinterpretation of Rule 38, that the delay was not explained in the briefs because no objection had been raised and the Attorney General had not wanted to intervene, and that the Montana Supreme Court had considered constitutional challenges in other cases where the delay had either been longer or not given at all. Petition for Rehearing, Appendix at 25. The petitioner further contended that the refusal to consider his constitutional challenges in these circumstances would amount to a denial of due process under the United States Constitution. On January 28, 1991, the Montana Supreme Court, by a five to two vote, denied the petition for rehearing without comment.

IV. ARGUMENT

I. Certiorari Should Be Granted Because the Montana Supreme Court's Refusal to Consider the Petitioner's Federal Constitutional Challenges Directly Contradicts Decisions by this Court Holding that State Courts May Not Arbitrarily Refuse to Review Constitutional Claims Plainly and Reasonably Asserted.

By refusing the review the petitioner's federal constitutional challenges, the Montana Supreme Court affirmed a District Court decision based, in part, on the plainly erroneous notion that Mr. Hoffman's parental rights are not entitled to constitutional protection because the State of Montana did not file the adoption petition. That the adoption petition was filed pursuant to a state statute and that the decision granting the adoption and terminating Mr. Hoffman's parental rights were made by a state judge readily demonstrates the pervasiveness of state action in this case. As one constitutional scholar has observed:

> If litigants challenge a federal or state statute, such as a law

> mandating racial segregation of public schools, in a case where the validity of the statute is necessarily implicated, state action is obvious, and no formal inquiry into the matter is needed. Similarly, the rule of decision expressly invoked or necessarily relied upon by a state's highest court--either to grant relief against one party or to deny the relief sought by another party--constitutes "state action" reviewable on the merits by the Supreme Court. (Emphasis in original.)

L. Tribe, American Constitutional Law, 2d Ed., p. 1688 (1988). Thus, the District Court's failure to recognize state action is obvious, and, as discussed below, the District Court's summary rejection of the petitioner's constitutional challenges to M.C.A. § 40-8-111(1)(a)(v) is equally wrong.

The Montana Supreme Court's refusal to review and correct the District Court's clear error on the constitutional issues is most disturbing, especially when the Supreme Court evaded review by invoking Rule 38, Montana Rules of Appellate Procedure. In doing so, the Montana

Supreme Court ignored not only its own precedent construing Rule 38, but the decisions of this Court governing due process on appeal.

While showing great deference to a state's authority to enact procedural rules for the orderly and timely presentation of federal constitutional claims, this Court has consistently held that such procedural rules must be reasonable, consistently applied, and must not be invoked to thwart the assertion of federal rights. In Davis v. Wechsler, 263 U.S. 22, 24 (1923), this Court cautioned:

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

In Williams v. State of Georgia, 349 U.S. 375, 382-83 (1955), this Court further observed:

> A state procedural rule which forbids the raising of federal questions at late stages in the

> case, or by any other than a prescribed method, has been recognized as a valid exercise of state power. The principle is clear enough. But the unique aspects of the never-ending new cases that arise require its individual application to particular circumstances. Thus, we would have a different question from that before us if the trial court had no power to consider Williams' constitutional objection at the belated time he raised it. But, where a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded [sic] from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner. (Emphasis added.)

Accord, Ward v. Love County, 253 U.S. 17, 22-23 (1920); Staub v. Baxley, 355 U.S. 313, 318-19 (1958); Henry v. Mississippi, 379 U.S. 443, 447-48 (1965). Here, the Montana Supreme Court arbitrarily applied Rule 38 to evade reviewing the petitioner's federal constitutional challenges

to a state statute invoked to terminate his parental rights.

Before this case, the Montana Supreme Court had never declined to review constitutional challenges because of a late Rule 38 notice where the Attorney General had sufficient time to intervene. In U.S. Manufacturing Corp. v. City of Great Falls, 169 Mont. 298, 546 P.2d 522 (1962), for example, the Rule 38 notice was filed forty days after the transcript was filed and twenty days after the District Court file was received. See, Appendix at 55. Despite this twenty to forty day delay, the Montana Supreme Court held that the Rule 38 notice was timely:

> Appellant's argument concerning compliance with Rule 38, M.R.App.Civ.P., is of little merit. In Grant v. Grant, Mont., 531 P.2d 1007, 32 St.Rep. 191, 193; Clontz v. Clontz, Mont., 531 P.2d 1003, 32 St.Rep. 169, 172; and Gilbert v. Gilbert, Mont., 533 P.2d 1079, 32 St.Rep. 163, 165; this Court declined to rule on constitutional issues raised on appeal because certification to this Court and notification to the

> Attorney General had not been given pursuant to Rule 38. Requiring such notice to the state's chief legal officer is to enable him to appear in defense of the challenged legislative acts. In this matter certification to this Court and notice to the Attorney General were accomplished on November 19, 1975. Such notice provided ample opportunity for the Attorney General to prepare for the hearing held February 4, 1976. The spirit of the rule appears satisfied when such opportunity to prepare for the constitutional challenge is given. Accordingly, we reject the emphasis which appellant seeks to place on the immediacy of the notice required by Rule 38.

U.S. Manufacturing, 564 P.2d at 524-25 (emphasis supplied).

It is important to note that in U.S. Manufacturing, seventy-seven days elapsed between the Rule 38 notice on November 19 and February 4 when the case was deemed submitted. Here, one hundred twenty-eight days passed between the Rule 38 notice on June 13 and the October 19 submission date. Thus, the Attorney General had even more time to prepare to intervene in this

case, had he so desired, than was available in U.S. Manufacturing. Yet, the Montana Supreme Court found the twenty to forty day delay in U.S. Manufacturing acceptable, but deemed the twenty day delay in this case unacceptable.

The Montana Supreme Court's unprecedented interpretation of Rule 38 in this case is even more startling in light of its decision in Eastman v. Atlantic Richfield Co., 237 Mont. 332, 777 P.2d 862 (1989). In Eastman, the Court held that it could decide constitutional issues raised for the first time on appeal where the issues "involve broad public concerns" and "the alleged error affects the substantial right of a litigant." Eastman, 777 P.2d at 865. The Attorney General did not appear in Eastman, even though the appellant challenged the validity of Montana's Occupational Disease Act, M.C.A. § 39-72-101 et seq., under both the United States and Montana Constitutions. Id.

There is no record of any Rule 38 notice being given at all in Eastman. Yet, the Montana Supreme Court decided the appellant's constitutional claims.

As the U.S. Manufacturing and Eastman cases illustrate, the Montana Supreme Court has not consistently enforced Rule 38. Indeed, excusing a twenty to forty-five day Rule 38 filing delay in U.S. Manufacturing, while not excusing a twenty day delay in this case, reflects the very sort of arbitrary, unreasonable use of procedural rules to evade asserted federal rights which this Court has consistently rejected. That the Montana Supreme Court raised the issue of Rule 38 compliance on its own, without any showing of prejudice by the Attorney General or Mr. Kimpton, reveals the Court's desire to evade the petitioner's plain and reasonable assertion of his federal rights.

Because of the Montana Supreme Court's decision, the petitioner has had

no meaningful review of his claim that his three children were taken from him in violation of the United States Constitution. Given that parental rights constitute a "fundamental liberty interest", Santosky v. Kramer, 455 U.S. 745, 753 (1982), it is shocking and alarming to think that Montana's highest court would seize upon a harmless delay to ignore Mr. Hoffman's constitutional pleas on appeal--especially given the District Court's egregious decision. That the Montana Supreme Court would do this, even after being informed of this Court's decisions in cases like Williams v. State of Georgia, demonstrates the compelling need and importance for a writ of certiorari in this case.

II. Certiorari Should Be Granted in This Case (1) Because the Specific Issue of Whether it is Constitutionally Permissible for a State to Terminate Parental Rights Solely Because of a Child Support Arrearage Has Not Been Decided By This Court, and (2) Because, in Direct Conflict With Decisions of This Court, the Montana Supreme Court's Decision

Infringes Fundamental Rights to Liberty, Equal Protection, and Due Process Through Impermissible Presumptions.

This Court has not decided if a parent is constitutionally protected from having his children taken from him for falling behind in making child support payments. This Court, however, has identified a number of constitutional limitations on a state's power to restrict or abrogate fundamental rights inherent in family life.

In Stanley v. Illinois, 405 U.S. 645 (1972), for example, the issue was whether a state could take away an unwed father's children without a hearing through a presumption that unwed fathers are unfit parents. In finding unconstitutional the Illinois statute which authorized that procedure, this Court held that, under the due process and equal protection clauses, parental rights could not be terminated absent a hearing and specific proof of neglect. Stanley, at 654-57. This Court

expressly rejected the proposition that parental rights could be terminated by presumption:

> It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children...
>
> * * *
>
> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

In Zablocki v. Redhail, 434 U.S. 374 (1978), this Court found a Wisconsin statute unconstitutional under the equal protection clause because it prohibited persons with unpaid child support obligations from getting married. Zablocki, 434

U.S. at 382. In analyzing the statute under the equal protection clause, this Court found that the statute created a class of Wisconsin residents who could not marry unless they were current in their child support obligations. Id., at 375. This Court then stated that:

> When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.

Id., at 388.

In applying strict scrutiny to the interests allegedly advanced by the Wisconsin statute, this Court held that the statute's "broad infringement" on the fundamental right to marry could not be justified. Id., at 389. Noting that Wisconsin has "numerous other means for exacting compliance with support obligations" which "are at least as effective as the instant statutes and yet do not

impinge upon the right to marry," this Court held that the statute impermissibly burdened the right to marry for those Wisconsin residents with child support obligations. Id.

In Quilloin v. Walcott, 434 U.S. 246 (1978), this Court held that an unwed father who never had or sought custody of his son could not veto an adoption by the child's step-father where the adoption was in the child's best interest. In reaching this conclusion, this Court observed:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.

Quilloin, 434 U.S. at 255 (quoting Smith v. Organization of Foster Families, 431 U.S. 816, 862-63 (1977)). This Court further indicated that divorce would not diminish the constitutional protections

afforded a father who cared for his children during marriage:

> ...legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage.

Id. at 256.

As noted earlier, the petitioner in this case had joint custody of his children when his parental rights were terminated. It is apparent, then, that the Montana Supreme Court's application of M.C.A. § 40-8-111(1)(a)(v) to affirm the termination of the petitioner's parental rights repudiates the principles set forth in Stanley, Zablocki, and Quilloin.

On its face, M.C.A. § 40-8-111(1)(a)(v) permits a child to be adopted over a parent's objection only if that parent, though financially capable, failed to provide any support to the child for the entire year before the adoption petition was filed. Had the Montana Supreme

Court applied the statute as written, this adoption clearly could not have occurred: Mr. Hoffman was impoverished for the first six months of 1988 and was financially unable to pay child support; and Mr. Hoffman did provide some support during 1988, a winter coat and a $100 money order, though the money order was refused.

The Montana Supreme Court, however, paid as little heed to the plain language of M.C.A. § 40-8-111(1)(a)(v) as it did to the rulings of this Court in Stanley, Zablocki, and Quilloin. Instead of shielding Mr. Hoffman's constitutional rights, the Court severed them through a strained reading of the statute.

Like the District Court, the Montana Supreme Court cited M.C.A. § 40-8-111(1)(a)(v), but then failed to make any determination about Mr. Hoffman's ability to support his children throughout 1988. The Court simply noted that Mr. Hoffman's gross income was "at least $10,000."

Matter of Adoption of C.J.H., 803 P.2d at 215. Similarly, though noting that Mr. Hoffman purchased the winter coat, the Court failed to acknowledge that Mr. Hoffman did provide support in 1988.

Though M.C.A. § 40-8-111(1)(a)(v) says nothing about court ordered child support payments, the Montana Supreme Court has construed the statute to require that a parent be no more than one year behind in child support in order to veto an adoption. Matter of Adoption of R.A.S., 208 Mont. 438, 679 P.2d 220, 223 (1984). In addition, though current payments must be applied first to any arrearage to determine whether a parent is more than a year behind, any payments made after the adoption petition is filed simply do not count. Matter of Adoption of C.J.H., 803 P.2 at 216. Why? Because otherwise a parent might bring an arrearage current and veto a proposed adoption. Id. For reasons unexplained,

the Montana Supreme Court considers child support paid after an adoption petition is filed to be against a child's best interests.

What is so invidious about the Montana Supreme Court's construction and application of M.C.A. § 40-8-111(1)(a)(v) in this case is that "unfitness" is presumed from the inability to stay current within a year of court ordered child support payments, regardless of the parent's ability to pay and regardless of his ability to love and nurture his children.

This situation is further aggravated by the "Catch-22" relationship between child support payments and the cost of legal services. In Montana, child support payments can be reduced only prospectively from the date a petition for modification is filed. M.C.A. § 40-4-208(1). Thus, to reduce a child support payment which a parent can no longer afford, counsel must

be hired. Yet, if there is not enough money for child support, then there certainly is no money to pay for legal fees. A vicious cycle then ensues where the parent's child support arrearages increase each month, where reduced payments, if any, are automatically applied to arrearages, and where the parent's right to veto the adoption of his children is steadily eroded--all because the parent could not afford an attorney to lower the child support payments in the first instance.

As written, M.C.A. § 40-8-111(1)(a)(v) would protect an indigent parent because the test is the parent's ability to support the child in the year before the proposed adoption. As applied by the Montana Supreme Court, however, the test is whether the parent is current within one year of court ordered child support payments, regardless of the parent's ability to pay. Thus, in addi-

tion to presuming unfitness from the mere fact of a child support arrearage, the Montana Supreme Court also presumes that parents should always be able to pay court ordered child support. As Stanley demonstrates, such presumptions are constitutionally impermissible under the due process clause.

The Montana Supreme Court's application of M.C.A. § 40-8-111(1)(a)(v) also violates the equal protection clause. Ironically, the petitioner would have a better chance of preserving his parental rights had he been convicted of abusing or neglecting his children instead of falling behind in paying child support to his ex-wife. Had he abused or neglected his children, the petitioner would be entitled to court appointed counsel, M.C.A. § 41-31-607(2), as well as an opportunity for rehabilitation, M.C.A. § 41-30-609(1)(c), before his parental rights could be terminated. Surely, the parental rights of one

who falls behind in making child support payments are entitled to as much protection as one who abuses or neglects his children.

This is especially true where Montana has a wide variety of effective means, short of terminating parental rights, for furthering its legitimate interest in enforcing child support obligations. See, e.g., MCA § 40-4-204(5)(a) (automatic withholding from obligor's income); MCA § 40-4-207 (assignment of earnings to obligee); MCA § 40-5-110 (civil contempt); MCA § 40-5-203 (child support enforcement services); and MCA § 45-5-621 (misdemeanor and felony crimes for non-support).

These procedures are certainly more effective than MCA § 40-8-111(1)(a)(v) in enforcing support obligations given that the ironic result of MCA § 40-8-111(1)(a)(v) is to terminate parental rights, thereby extinguishing the child support obligation altogether. Thus, if a

parent is able to pay child support, but fails to do so, effective, efficient means already exist in Montana to exact payment. In contrast, MCA § 40-8-111(1)(a)(v) is a wholly ineffective means to enforce child support obligations and, under Zablocki, cannot justify any infringement upon a fit parent's right to veto an adoption.

V. CONCLUSION

The petitioner's record in supporting his children was without blemish until the collapse of the construction industry in Montana. Then, because he could hardly find enough carpentry work to support himself, he started falling behind in his child support payments. There can be no question, however, about the petitioner's love and devotion to his children. He never stopped being a father.

Parental rights are, along with liberty and equality, the most fundamental rights recognized by law:

> This parental right transcends all property and economic rights. It is rooted not in federal or state statutory constitutional law, to which it is logically and chronologically prior, but in nature and in human instinct.

In Re J.P., 648 P.2d 1364, 1372-74 (Utah 1982); Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977) ("...the liberty interest in family privacy has its source... in intrinsic human rights...")

Here, the Montana Supreme Court refused to even consider the petitioner's federal constitutional challenges and affirmed the termination of his parental rights through presumption, without any consideration of his fitness as a parent or his ability to pay child support. Its decision demonstrates that the Montana Supreme Court has lost sight of its constitutional duty to protect parental rights from unwarranted state action. As a result, the petitioner has suffered, as others will, a terrible injustice. He

lost his three children for want of money. The petitioner respectfully asks this Court to grant his request for a writ of certiorari.

RESPECTFULLY SUBMITTED this 27th day of April, 1991.

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